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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1136

ADDRESSOGRAPH-MULTIGRAPH CORPORATION, a Corporation,

Petitioner,

v.

AMERICAN EXPANSION BOLT AND MANUFACTURING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX

PAGE

Official Report of Opinions 2
Jurisdictional Grounds 2
Concise Statement of the Case 2
Argument 5
Petitioner's assertion that diverse State laws apply 5
The Stevens-Davis Case 6
The Rule in Erie v. Tompkins Applies 11
Locus of Actions Complained Of 15
Minor Charges of Misconduct 17
Petitioner's Effort to Promote Confusion 18
Acts Main and Incidental. A Dilemma 19

CASES CITED.

Chase National Bank v. Mobile & Ohio R. Co., 39 Fed. Sup. 565 13
Erie Railroad Company v. Tompkins, 304 U. S. 64, 65, 69, 78 ..... 4, 5, 7, 11
Klaxon Company v. Stentor Electric Co., 313 U. S. 487 11
Illinois Central Railroad Co. v. Moore, 112 Fed. (2) 959, 963 12
International News Service v. Associated Press, 248 U. S. 215 ..... 6, 8
Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 119 Fed. (2) 316, 321, 332 14
Pecheur Lozenge Co. v. National Candy Co., 86 L. Ed. 739 5
Stevens-Davis Co. v. Mather & Co., 230 Ill. App. 45, 60, 69 (pp. 66, 72, 73, 84, 90, 92, 97, 111) 5, 6, 8, 9, 20

STATUTES CITED.

Section 77, Bankrupt Act 13

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondent, American Expansion Bolt and Manufacturing Company, respectfully points out that the petition for writ of certiorari should be denied, for the reason that no special or controversial question of law is pre-

sented, and for the reason that all of the matters set forth in Petitioner's brief were duly presented and fully considered and decided by the Court of Appeals for the Seventh Circuit in complete conformity with the law as announced by the decisions of this Court.

Official Report of Opinions.

The report of the Master finding the more important issues in favor of respondent is found on page 399 of the record. The District Court (Judge Igoe) filed no opinion other than the findings of fact submitted by petitioner's attorneys (R. 421), and assigned no reasons for overruling the Master's findings on the most important issues.

The opinion of the Court of Appeals, reversing the District Court and vacating the judgment and dismissing the complaint, is found on page 511 of the record and is reported in 124 Fed. (2) 706.

Jurisdictional Grounds.

Respondent does not challenge the jurisdictional grounds set forth on page 4 of the petition.

Concise Statement of the Case.

The decision of the Court of Appeals is based upon the ground that the complaint does not set forth nor do the proofs establish a suit for *unfair competition* according to the ruling of the Illinois Courts, which define such a suit as one involving the *palming off of defendant's product as and for the product of the plaintiff*, and hold that unless the facts conform strictly with this definition the *suit must fail*. Petitioner nowhere asserts that the present suit conforms to the above definition.

The principal charge to which all others are ancillary or incidental is that respondent has misappropriated petitioner's business system, which is merely a euphonious way of stating that the respondent is selling printing plates exactly conformable to the petitioner's *expired patents* for use on Addressograph machines of petitioner's manufacture and is inducing petitioner's customers to buy plates at a reduced price and in an open market. There is no charge that respondent has ever palmed off its own plates as and for the product of the petitioner, but on the contrary petitioner asserts that respondent has made extravagant and unwarranted claims regarding the quality of its own plates and has asserted that petitioner was charging monopolistic prices for its product.

The subordinate or incidental charges were summarized by the Master as follows (R. 400):

II. Distribution of inferior products to the injury of plaintiff's good will.

III. Palming off *plaintiff's* plates as *defendant's* plates. (Note: Not the conventional charge of palming off.)

IV. Misrepresentation of origin and quality of defendant's plates.

V. Improper acquisition of information concerning plaintiff's customers, methods of doing business, and method of manufacture.

VI. Defamation of plaintiff's business by falsely representing to customers (a) that plaintiff's agents had maliciously tampered with and sabotaged machines of customers who were using plates manufactured by the defendant, and (b) that plaintiff is monopolistic.

The dominating charge is that respondent has misappropriated petitioner's business by selling its own plates for use on Addressograph machines. All of these sales were *consummated* in Illinois, and the main transaction was thus *completed* in that state; and since no Federal question is involved the rule of this Court announced in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 78, has full application. All of the remaining grounds of complaint, which were treated by the Court of Appeals as "merely incidental to the main charge" and as at most "acts of aggravation to the main charge" are obviously acts designed to *promote* and *increase* the sale *in Illinois* of respondent's plates, or in furtherance of the so-called plan for misappropriating petitioner's business.

Thus the Court of Appeals correctly held that the essential transactions were carried on and consummated wholly within the State of Illinois, and that a Federal Court sitting in that state was obligated to apply the Illinois law respecting suits for unfair competition.

NOTE: Italics throughout are ours.

ARGUMENT.

Petitioner's Assertion that Diverse State Laws Apply.

It is urged by petitioner that the present case, involving the use by its customers of respondent's plates shipped into various States of the Union, constitutes an exception to the rule laid down in *Erie* v. *Tompkins,* 304 U. S. 64, but alternatively, if the rule is to be applied, the laws of each of the states within which respondent's plates were *used* must be examined to determine the local definition of a suit for unfair competition. Both of these arguments were rightfully rejected by the Court of Appeals.

Erie v. *Tompkins,* 304 U. S. 64, 78, expressly states on Constitutional grounds that "except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." This Court in a decision handed down March 30, 1942 in the case of *Pecheur Lozenge Co.* v. *National Candy Co.,* 86 L. Ed. 739 stated that "The only cause of action that this record could possibly support is for *unfair competition* and common law 'trade mark infringement' to which *local law applies.*"

Such being the case, the Court of Appeals took cognizance of the law of unfair competition as defined and applied by the Illinois Court in *Stevens-Davis Co.* v. *Mather & Co.,* 230 Ill. App. 45. In this connection, the Court of Appeals said:

"Confronted wtih this situation, no good purpose could be served in analyzing the many Federal cases relied upon by plaintiff in support of the decree. This is so for the reason that the law of unfair competition, as announced in Illinois, must be applied. In *Stevens-Davis Co.* v. *Mather & Co.*, 230 Ill. App. 45, in an exhaustive opinion where the issues were quite similar to those of the instant case, that court, after an extensive review of the authorities, 230 Ill. App. on page 65, said 'The courts in this State do not treat the "palming off" doctrine as merely the designation of a typical class of cases of unfair competition, but they announce it as the rule of law itself—the test by which it is determined, whether a given state of facts constitutes unfair competition as a matter of law. * * * The "palming off" rule is expressed in a positive, concrete form which will not admit of "broadening" or "widening" by any proper judicial process. It is rigid and inelastic.' "

The Court then pointed out that the plaintiff relied heavily upon *International News Service* v. *Associated Press*, 248 U. S. 215, which constitutes the basis for the so-called theory of unfair competition by *misappropriation* of plaintiff's business system, and followed with the statement "That identical theory was presented and rejected in the *Stevens-Davis* case and the *International News Service* case was referred to. * * * In other words, the *Stevens-Davis* case, repudiates the precise theory on which plaintiff attempts to sustain the decree in the instant case. * * *"

The Stevens-Davis Case.

In view of the importance of the *Stevens-Davis* case, we think it proper to refer to it briefly, although the exhaustive opinion runs through some eighty pages of printed matter. The bill in that case, as in the present suit, charged numerous acts which were regarded as of-

fensive by the plaintiff. Among others may be mentioned, slander or libel, the misuse of testimonial letters, the surreptitious acquiring of secret information, the enticing of employees, and the use of fictitious or extravagant advertising. Twenty-two specific wrongful acts were asserted by the plaintiff, including certain acts which the Court regarded as coming within the palming off rule. The Court, therefore, first directed its attention to the necessity for *segregating* the evidence and excluding from consideration all matters which were not closely related to the charge of palming off, and after an exhaustive review of the evidence relating to *relevant* matters, the Court dismissed the bill *in toto*. In adopting this course of procedure, the Court, on page 69, made the very cogent statement which has complete application to the case here presented:

> "In reviewing the facts, if the rule of law, namely, the 'palming off' rule, and the rule as to the degree of proof, which rule requires appellee's right to be clearly established by the evidence, are not kept constantly in mind, one is apt to get into *inextricable difficulties.*"

Petitioner is here asking the Court to adopt a rule of interpretation and to remand the case for the taking of further evidence regarding the laws of the various states, which will most certainly be productive of "inextricable difficulties," and which will moreover completely vitiate the force and effect of this Court's rule in *Erie* v. *Tompkins*, and the Illinois Court's ruling in *Stevens* v. *Mather*.

Additional excerpts from the *Stevens-Mather* case are the following (page 65):

> "We are of the opinion from our examination of the authorities, that the 'palming off' doctrine has been followed by both the state and federal courts in an almost unbroken line of decisions, as a rule of

law, and that the courts of this state also deem it to be a rule of law. If it is not the rule of decision by which the facts may be tested, what is the general rule that has supplanted it? We are unable to discover any other general rule; and it is not within the jurisdiction of this court to formulate a rule of decision. Each case is not to be left to the discretion of the court to be decided according to the court's idea of justice and right. The 'palming off' rule is expressed in a positive concrete form which will not admit of 'broadening' or 'widening' by any proper judicial process. It is rigid and inelastic."

Having reference to the case *International News Service* v. *Associated Press*, 248 U. S. 215, the Court said (page 66):

"The decision of the Supreme Court of the United States, although entitled to the deference which is due to so distinguished a tribunal, is not a rule of decision that must be followed by a State court in the class of cases in question."

With regard to the alleged improper use of trade secrets, the Court said (page 72):

"If appellee was entitled to equitable relief in this respect it would be based on *another ground than unfair competition*. The acts of appellants obviously do not come within the 'palming off' rule and that is the test that we have adopted as the rule of law in the case at bar."

With regard to the enticing of employees, the Court said (page 73):

"It is also contended that employees of appellants attempted to entice away salesmen of appellee who were attending the convention. In our opinion *none of these acts* constitutes unfair competition."

With regard to the copying or plaguarizing of plaintiff's booklets, the Court said (page 84):

> "In this situation, even if they were bodily appropriated by appellants, no legal wrong would be committed which could be redressed *in this proceeding.*"

With regard to the alleged fraudulent use of testimonial letters, the Court said (page 90):

> "* * * we do not deem it necessary to dwell at length on the question, as in our judgment the conduct of appellants *did not constitute unfair competition.*"

As indicative of the manner in which the Court segregated the various transactions, we refer to the following quotation (page 92):

> "Counsel for appellee maintain that in several specific instances the salesmen of appellants sold appellants' cards as those of appellee. If that is true, such acts come within the rule of unfair competition. We shall examine the facts relating to these transactions."

With regard to extravagant advertising, the Court said (page 97):

> "It is fictitious praise or 'puffing' of appellants' card service; but it is not a 'palming off' or an attempt to 'palm off' appellants' card service for that of appellee."

With regard to certain statements that the defendant's salesman had made, the Court said (page 111):

> "Furthermore, even if Warner had made the statement, it would not have been unfair competition but a *trade slander* for which *an action at law* could have been maintained."

Fortunately, in the present situation it is not necessary for the Court to segregate between acts which properly

come within the Illinois rule since the petitioner nowhere attempts to prove that the defendant has sought to palm off its goods as and for the product of the plaintiff. The Court of Appeals as a matter of *fact* stated:

> "We do not understand there is any contention that the proof discloses a conventional charge of 'palming off'. The proof relative thereto, and any contention arising therefrom, must be viewed in the light that it was incidental to the main charge of unfair competition with plaintiff's business system."

The above ruling follows the finding of the Master, who stated on page 403:

> "In the case at bar, defendant's general course of business did *not* involve misappropriation or passing off. On the contrary, defendant took particular pains to point out that though its plates were as good as those of plaintiff, they were being sold at a lower price. Certainly there can be no possibility of pointing to the existence of any passing off. None of the orthodox elements of unfair competition nor any of the allegedly unusual features of the *International News Service* case are here present. The American Expansion Bolt & Manufacturing Company, unlike the International News Service, has in no way appropriated plaintiff's *property* in order to sell it to customers who have never paid anything to plaintiff * * *"

In the light of the above findings of fact, it is clearly apparent that the Illinois rule as announced in the *Stevens-Davis-Mather* case has full application to *every branch* of the present proceeding, and this Court's decision in *Erie* v. *Tompkins* makes it obligatory on the Federal Courts to apply the Illinois rule and dismiss the complaint *in toto*.

The Rule in Erie v. Tompkins Applies.

Erie v. *Tompkins* makes no exception respecting the rights of litigants merely because the business in question extends into various states of the Union. The decision is based on constitutional grounds for the purpose of protecting the citizens of each state against judicial encroachment by Federal Courts upon rights reserved under state laws. The mere fact that certain of the acts in a continuing transaction occur in a distant state affords no ground for the deprivation of rights assured under local law and judicial procedure despite the fact, as asserted by counsel, that in certain instances confusion may arise by reason of the conflict of laws in the different states.

The primary objective is to assure an equal administration of justice by State and Federal Courts of concurrent jurisdiction located in the state where the principal controversy arises. This point of view is expressly set forth by this Court in the recent case of *Klaxon Company* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487. In considering the conflict of laws rule, this Court said:

> "Otherwise the accident of diversity of citizenship would constantly disturb equal *administration of justice* in co-ordinate state and federal courts sitting *side by side*. See *Erie* v. *Tompkins*, *supra*, at 74-77. Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever *lack of uniformity* this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to *pursue local policies* diverging from those of its neighbors. It is not for the federal courts to *thwart* such local policies by enforcing an independent 'general law' of conflict of laws."

The Court might have said with equal propriety that it is *not* for the Federal Court of Illinois to *thwart* the local policy respecting suits for unfair competition by enforcing an independent "general law" of unfair competition. This, however, is precisely what the petitioner is seeking to accomplish in the present instance.

In counsel's attempt to prove that the present case is not within the rule in *Erie* v. *Tompkins*, it is asserted that "respondent's conduct involved a series of successive and continuous tortuous acts, resulting in many injuries in the many states wherein petitioner's customers reside." Without admitting that the above statement is in any manner relevant to the question, its fundamental fallacy, as regards the present issues, lies in the fact that under the Illinois law the "tortuous" acts referred to are not *germane* to a charge of unfair competition and since petitioner's main charge fails in Illinois the entire foundation for a suit of that character must fail. The fact that certain of the acts *complained of* may have transpired in distant states is of no consequence, since the Federal Court must follow the local ruling respecting the matters germane to the case and must also conform the remedy to the requirements of the local practice.

Counsel refers to the case of *Illinois Central Railroad Co.* v. *Moore*, 112 Fed. (2) 959, in support of its ill-founded contention that an unfair competition case charging transactions in various states must be regarded as an exception to the rule. The railroad case however was held to involve a *Federal* question. This was a case arising under a contract of employment and the Court on page 963 said:

> "Its subject matter, the relationship of a railroad with its employees is well within the commerce power

> of Congress and has for fifty years been a subject of federal legislation. The very matter of collective agreements was taken over and extensively regulated and remedies for disputes provided by the Railway Labor Act of 1926."

Chase National Bank v. *Mobile & Ohio R. Co.*, 30 Fed. Sup. 565, cited by counsel, was a case involving the allowance of claims against a receiver growing out of personal injury to employees which claims had been paid *after judgment* by the bonding company.

This case involved numerous Federal questions and was based on the provisions of Section 77 of the Bankrupt Act which provided that claims arising under the Federal or State laws "shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroads." The Court said "Congress of course knew of the *six months rule* as applied to such equity receiverships and passed this Act to make definite the right to be paid out of the earnings of the railroads."

The Court decided that the rule requiring that the claim must have accrued within six months prior to the receivership was applicable to the Congressional enactment and the suit being against a railroad which ran through five states, ruled that the law of the state where the injury occurred was not applicable. In short the remedy sought was that provided by the Federal Bankrupt Act in satisfying an existing judgment from which it would appear to be unnecessary to investigate the law invoked in securing the judgment. The Court also said:

> "How is the court to determine what portion of the earnings of the road was realized in each state or what portions of the cost of operations was incurred in such state. Only a little thought is necessary to show

> what a confusion worse confounded we would have. * * * I do not think that either Section 34 or what is said in *Erie R. Co.* v. *Tompkins* are *applicable* to the questions to be decided by me."

Surely the above decision affords no basis for counsel's arguments but on the contrary emphasizes the necessity for a strict adherence to the system of laws applicable to the controlling issues to prevent "confusion worse confounded."

This is not the first time since *Erie* v. *Tompkins* that a Federal Court has applied the local rule respecting trade rights and remedies in a case where the respective products were in competition throughout a multiplicity of states. In the recent case of *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.*, 119 Fed. (2) 316 (June 9, 1941), the Court of Appeals for the Sixth Circuit applied the rule in *Erie-Tompkins* to a suit charging unfair competition and trade-mark infringement, and held expressly that the Federal Court is bound to recognize substantive rights in trade-marks as *defined by the law of Michigan*. On page 321, the Court said:

> "Appellant's shoe heels have been sold *throughout the United States* always as a part of its shoes, never separately. Appellee the S. S. Kresge Company operates and maintains a large number of retail stores *throughout the United States* where it sells detached rubber heels," etc.

Despite the overriding of state lines by both parties, the Court on page 322 said:

> "Whatever substantive rights appellant may have had in the premises arise under *local law* and are within the scope of *Erie Railroad Company* v. *Tompkins* * * * The rule prevails in Michigan that an account

of profits will not be taken where the wrongful use of a trade-mark or trade-name has been merely accidental or without any actual or wrongful intent to defraud the original owner or to deceive the public."

The Court thus restricted the plaintiff's rights and remedies in conformity with local procedure, which is exactly what the Court of Appeals for the Seventh Circuit has done in similar circumstances, despite the fact that some of the goods complained of were sold into and distributed and used in states distant from the local forum.

Locus of Actions Complained Of.

As pointed out by the Court of Appeals:

"The essential element of this alleged wrong (misappropriation) was the manufacture and sale by the defendant of plates for the purpose of use in certain machines manufactured and sold by the plaintiff. Defendant's place of business was in Illinois where it received and filled orders for such plates. The wrong, if such it be, was the *sale in Illinois* for the use indicated. In our judgment there is no merit in plaintiff's argument that no wrong was committed, until the plates were actually *used* in a foreign state."

Although the dominating act was that of "misappropriation of plaintiff's business" by the *sale* of plates for use on Addressograph machines, counsel asserts, without any justification, that the wrong was not consummated until the plates were actually used, and counsel has repeatedly asserted without qualification or reservation that "The respondent manufactured its products in Illinois, which products were thereafter sold to persons in other states." (Plaintiff's brief, page 19).

Counsel, on page 20, states:

"Since the place that petitioner received its injury was in states other than Illinois, the Court of Appeals clearly was in error," etc.

Throughout the brief there appears to be a studious effort to convey the impression that *none* of respondent's plates were actually *used* in Illinois, and that in no case (according to Counsel's definition) were the transactions consummated in that state. If such be the inference, it is clearly belied by the testimony which indicates that in certain instances large numbers of plates were actually *used* in Illinois.

We have the testimony of A. H. Anderson (Rec. 308) that he was in charge of the Addressograph Department of the Bunting Publications located at North Chicago, which is in Illinois; that this concern had a mailing list of about 250,000; that it used a number of Addressograph machines and Graphotypes; that his department had used plates furnished by both the Addressograph company and American Expansion Bolt & Mfg. Co.; that it used the latter plates for four or five years; that his company had used no Addressograph Co. plates for the preceding two or three years; that he had never been able to notice any difference in the two plates and that his company had never registered any complaints with respondent on account of the character or quality of the plates. The above is an instance where the plates were *manufactured, sold* and *used all within the State of Illinois.*

Another instance of like character is that of plates furnished by respondents to American Power and Light Company, of Chicago, Illinois. The facts regarding this trans-

action were set forth in the testimony of J. Warren Isett, on page 325 of the record. These plates were used locally and complaint was registered regarding their quality. Four thousand plates of a shipment of five thousand had previously been embossed satisfactorily on the Graphotype machines. Investigation showed that the defect was due to broken plate supports on two of the Addressograph Co.'s machines, that petitioner's repairman had adjusted the machines on the previous day, and that the trouble started a *few hours* after his visit. The facts learned by Mr. Isett during this interview developed in him a *well founded belief* that the machines had been purposely tampered with by the repairman for the purpose of discrediting respondent's plates, and furnished a foundation for future warning statements made by respondent to other customers, which constitute the basis for the libel charges. After the interview in question, respondent "made subsequent sales and are selling them to this day." (Rec. page 329).

Certainly, in the light of the testimony, counsel should have called the Court's attention to the fact that *some* of these transactions were *completely consummated* in Illinois, so that *all* the factors involved were of local occurrence.

Minor Charges of Misconduct.

With respect to the minor charges of misconduct, petitioner's petition is peculiar and untenable. Counsel contends that these minor charges are amenable to the varying laws of a multitude of different states where individual shipments of respondents plates were *used* or where the so-called "false statements and libelous utterances were published." The above assertion however certainly cannot apply to the supposed "acquisition of information concerning plaintiff's customers, methods of doing business, and method of manufacture," all of which transactions

occurred locally in Illinois. Nor need any individual case of alleged libel necessarily be consummated in the same state where the recipient of the "libelous" statement *used* the plates. According to petitioner's theory therefore *each transaction* regardless of the parties involved, the nature of the wrong committed or the remedy (whether at law or in equity) afforded, must be analyzed independently and segregated and redressed according to the local law of the state where each wrong was *consummated* and the measure of relief to be granted in a single suit in equity must be apportioned to all these diverse and often incompatible factors. The mere prospect of such disruption of the orderly administration of justice should make the Court astute in seeking to discover the fallacy in any theory which makes it possible.

Happily the Court of Appeals adopted the only sensible view of the situation here presented and held that "the wrong, if such it be, was the sale in Illinois for the use indicated," and that "the other alleged offences such as libel and misrepresentation were merely incidental to the main charge" and were at most "acts of aggravation to the main charge. When the main charge fails, those incidental thereto must also fail."

Petitioner's Effort to Promote Confusion.

Counsel in attempting to formulate a basis for the granting of the present writ occupies an absurd position. On page 15 counsel points out the difficulties and complications attending the application of the *Erie-Tompkins* rule to cases of unfair competition due to the diversity of laws of the various states into which the offending goods are introduced and *palmed off*. On page 26 however, counsel petitions this Court to remand the case to

permit additional testimony to be adduced so that the present case may be thrown into the condition of complexity and confusion which counsel deplores.

Fortunately no occasion is here presented for examining the laws of states other than Illinois since this is *not a case of palming off* in which it might perhaps be urged that a separate offense occurred in each state where *customers were deceived.* No deception is here charged since the act of "misappropriation" occurred in Illinois when the goods were sold and not thereafter when they were used.

Moreover counsel's assertions that the misappropriation did not occur until the goods were *used* in a distant state is belied by the averments of the bill of complaint itself which on page 5 of the record states: "The plates are designed to be used in addressing machines manufactured by the plaintiff and for *no other purpose*, and in truth and in fact said plates have *no other commercial use* or value except as above stated."

Every sale made by the respondent therefore is asserted to be a "misappropriation" of petitioner's business and a deprivation of its right to a monopoly in such sales and undoubtedly in the event of an accounting petitioner would claim damages on the basis of a sale lost for every sale made by the respondent regardless of where the plates were used.

Acts Main and Incidental. A Dilemma.

Petitioner asserts that each act of alleged unfair competition must be treated *independently* and redressed according to the laws of the state where it was consummated regardless of the fact that the bill of complaint

purports to present a charge of *unfair competition* and prays relief appropriate to such a charge. The present suit however must fail because under the Illinois law independent charges not closely related to a dominating charge of *palming off* will be *excluded from consideration.*

In *Davis* v. *Mather,* on p. 60, the Court said:

> "If in accordance with their theory of the case they had indicated what acts of appellants in their opinion constitute unfair competition the other alleged wrongful acts *could be eliminated* from consideration as substantive independent instances of unfair competition and could be considered, if relevant, *merely in aggravation* of unfair competition."

On page 69 the Court said:

> "In this inquiry we are not concerned with unethical or wrongful acts generally but our attention must be directed solely to such wrongful acts as come within the rule of unfair competition. We are not condoning unethical conduct merely because we may be of the opinion that such conduct does not, as a matter of *law* constitute unfair competition. The different classes of wrongs must be distinguished in order that it may be determined whether the remedy should be by law or equity. The remedy by equity is *more drastic* and of broader scope."

In short the Court refused to deprive the defendant of its legal rights to a proper trial of unrelated issues by permitting the plaintiff to bunch together all of its multiform grievances into a single short cut proceeding labeled a suit for "unfair competition" and to demand relief in equity for offences against which it was entitled only to a legal remedy in conformity with accepted practice.

Petitioner thus finds itself enmeshed in a fatal dilemma. On the one hand if the minor acts complained of are to

be regarded as *incidental* to the main charge of "misappropriation" they must fail with the failure of the main charge. On the other hand if these minor acts are *independent* of the main charge they *will not be considered* by a Court which is bound to follow the Illinois law. The Court of Appeals was obviously right in its conclusion that "not only was the decree appealed from erroneously entered, but * * * plaintiff's bill of complaint failed to state a cause of action."

Respectfully submitted,

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April 21, 1942.